No. 3444

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EMMA F. RUMSEY,

Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY and BENSON, SMITH AND COMPANY, LIMITED,

Appellees.

APPELLANT'S REPLY BRIEF AND BRIEF ON MOTION TO DISMISS APPEAL.

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PERNAU-WALSH PRINTING CO.

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THE MOTIONS TO DISMISS.

In the brief of Benson, Smith and Company, it is argued, *in limine,* that the appeal should be dismissed because, as they say, the decree appealed from is not a final decree. They cite many cases in support of this proposition. When these cases and all of the rules, with respect to the finality of judgments, announced by the Supreme Court of the United States, are analyzed, we think this court must hold that the judgment of the Supreme Court

of Hawaii *is a final judgment,* within the principles governing appellate jurisdiction, *as it unquestionably is in fact.*

The opinion of the Supreme Court of Hawaii ends as follows:

> "The decree appealed from is reversed and the cause remanded to the Circuit Judge for such further action compatible to this decision as may be necessary" (Tr. p. 452).

This language is copied in the decree (Tr. p. 453).

The decision is therefore made a part of the judgment and the lower court is directed to do what may be necessary, compatible to that decision. There is a direct order expressed in this judgment, which, upon investigation of the opinion, is found to be a *direction* ending all litigation between the parties.

The mandate of a Supreme Court is to be interpreted according to the subject matter of the proceedings and not in a manner to cause injustice.

> Wayne County v. Kennicott, 94 U. S. 498;
> Story v. Livingston, 13 Pet. 359.

The opinion delivered by an appellate court, at the time of rendering its decree, should be consulted to ascertain what is intended by its mandate.

> Re Sanford Fork & Tool Co., 160 U. S. 247.

To ascertain the true intention of the decree and mandate of the Supreme Court, the decree of the court below and of the Supreme Court must be taken into consideration.

> Mitchel v. U. S., 15 Pet. 52.

The opinion of the Supreme Court of Hawaii is found from pages 442 to 452 of the printed Transcript of Record. On page 452, at the close of the opinion, the court says:

> "The appellee, the New York Life Insurance Company, having paid the judgment rendered against it in favor of the beneficiary in said policy, Benson, Smith and Company, Limited, is absolved from any and all further liability under said policy."

This makes the judgment as final as it could be made, so far as the New York Life Insurance Company is concerned. In the opinion the court expressly says that Benson, Smith & Company, Limited, had an insurable interest in the life of Rumsey, and at the bottom of page 449, says that the policy, having been taken out by Rumsey, for the benefit of Benson, Smith & Company, under an agreement between the three principal stockholders, Rumsey could not afterwards change the beneficiary. That is a final and conclusive determination that the appellant has no interest in the policy and could have none under any conceivable change of beneficiary that might have been attempted to be made without the consent of Benson, Smith & Company. This is clearly a final determination against appellant and in favor of Benson, Smith & Company.

Under these circumstances the litigation of the parties, as to the purpose of the case, was terminated by the decree of the Supreme Court of Hawaii. It is true the case was remanded to the lower court

"for such further action *compatible to the decision* as may be necessary", but the only thing the lower court can do "*compatible to the decision" is to dismiss the case,* for every question was determined against the appellant, who was the petitioner below. If the Supreme Court of Hawaii had, in so many words, directed that the case be remanded and the petition dismissed, it would not have more effectively ordered the dismissal than it did by the judgment which it entered. After the judgment of the Supreme Court of Hawaii nothing remained to be done in the lower court to carry the decree of the Supreme Court into execution but to vacate the judgment against the defendants and dismiss the case. No other action can be suggested "compatible to the decision".

The form of judgments of reversal, when the possibility of further action by the lower court is contemplated by the appellate court, is, generally, "for further action not inconsistent with the decision".

(See Winn's Heirs v. Jackson, 12 Wheaton 135.)

The Hawaiian court has not left its judgment open, as the form of judgment quoted does.

The Hawaiian court uses the word "compatible", but the decree is positive.

"Further *action compatible* to the decision."

That is, action *following* the decision.

Action *in accordance with* the decision.

Compatible

(1) Capable of existing together.

(2) Congruous.

(3) Consistent.

In Winthrop Iron Co. v. Meeker, 109 U. S. 180, the court said on page 183:

> "The litigation of the parties as to the merits of the case is terminated and nothing now remains to be done but to carry what has been decreed into execution. Such a decree has always been held to be final for the purpose of appeal."

And the court cites Bostwick v. Brinkerhoff, 106 U. S. 3, and the cases there cited, and quotes from Forgay v. Conrad, 6th How., at page 204.

In La Bourgogne, 210 U. S. 95, the court says on page 112:

> "The authorities concerning the distinction between interlocutory and final decrees were cited in the opinion in Keystone Manganese and Iron Co. vs. Martin, 132 U. S. 91, and the subject is fully reviewed in McGourkey vs. Toledo O. C. R. Co., 146 U. S. 536. The rule announced in these cases for determining whether, for the purpose of an appeal, a decree is final, is in brief whether the decree disposes of the entire controversy between the parties and illustrations of the application of the rule are found in the late cases of Clark vs. Roller, 199 U. S. 541-546, and Ex Parte National Enameling Co., 201 U. S. 156."

In Des Vergers v. Parsons, 8 C. C. A. 526 (5th Circuit), the court said, on page 533:

> "The decree meets all the requirements of a final decree as it terminates the litigation on the merits of the case and settles the rights of all parties. Many cases can be cited in support of this conclusion from Ray vs. Law, 3 Cranch. 179, down to McGourke vs. Railroad Co., 146 U. S. 536, where the cases respecting final and interlocutory judgments are reviewed and the distinctions between them pointed out. We content ourselves with citing Grant vs. Insurance Co., 106 U. S. 430, where it is declared that 'the rule is well settled that a decree to be final within the meaning of that term as used in the Act of Congress giving this court jurisdiction on appeal must terminate the litigation of the parties on the merits of the case, so that if there should be affirmance here the court below would have nothing to do but to execute the decree it had already rendered'."

As we said *the judgment* of the Supreme Court of Hawaii *makes its decision a part of its decree* so that the true character of the judgment of that court can be ascertained upon the examination of its decision, and *that decision explicitly and conclusively terminates the litigation between the parties and determines every question on the merits.*

From the line of decisions of the Supreme Court of the United States cited above the rule for determining whether, for the purpose of an appeal, a decree is final, is *whether the decree disposes of the entire controversy between the parties, and if it does, it is final and appealable.*

It has been held, in innumerable cases, by the Federal Courts, that a final decree is one settling all matters in litigation within the pleadings and

that a decree is absolutely final where issues raised by the pleadings were all submitted and the court passed on all the merits.

Talley v. Curtain, 58 Fed. 4;
Maas v. Longstorf, 166 Fed. 41.

Under the decision of the Supreme Court of Hawaii, the lower court had no *judicial function* to perform. All it could do would be to exercise the *ministerial function* of dismissing the case as though it had been, in terms, directed to do so.

In McGourkey v. Toledo & Ohio R. R. Co., 146 U. S. 536, the court said, on page 545:

> "It may be said in general that if the court make a decree fixing the rights and liabilities of the parties and thereupon refer the case to a master for a ministerial purpose only, and no further proceedings in court are contemplated, the decree is final; but if it refer the case to him as a subordinate court, and for judicial purpose, as to state an account between the parties upon which a further decree is to be entered, the decree is not final."

And on page 546:

> "But even if an account be ordered taken, if such accounting be not asked for in the bill and be ordered simply in execution of the decree, and such decree be final as to all matters within the pleadings, it will still be regarded as final."

It is true that in some of the cases cited by the appellees in the brief it was *apparently* ruled that the *face* of the judgment is the test of its finality. The language used in those cases is appropriate to

the conditions presented by the cases in which used and while the court, in some of them, apparently made the face of the judgment the test of finality, yet the court always gave a reason for so doing drawn from the condition of the case presented; this is stated in the latest expression of the Supreme Court that we have been able to find.

In Carondelet Canal Co. v. La., 233 U. S. 362, the court said on page 372:

> "In La. Navigation Co. v. Oyster Commission of Louisiana, 226 U. S. 99, we repeat the test of finality to be the face of the judgment and express the reasons to be that this court cannot be called upon to review an action of the state court piecemeal. The language was appropriate to the condition presented by the case for the pleading in the case was left open for amendment."

To find a reason for making the face of the judgment the test of finality, the court went into the case and found it would have to review the case piecemeal so to state that the test of finality was the face of the judgment was appropriate to the condition which was found to exist, to wit: that the pleading was left open for amendment. And on the same page the court said:

> "In M. & K. Interurban Co. v. City of Olathe, 222 U. S. 185, a demurrer was sustained to the plaintiff's pleadings in the trial court and the supreme court did not direct a dismissal of the suit but left it stand in the court below. We held that the judgment sought to be reviewed was not one which finally determined

> the cause, and that we were without jurisdiction."

Here, again, the Supreme Court, in order to apply the test of finality of the face of the judgment, looked into the condition of the case. In the same case (233 U. S., page 372), the court takes up the case of Hazelton v. The Bank, in 183 U. S. 130, and shows that the test of finality of the face of the judgment is applied only when its application is appropriate to the condition presented by the case.

The court says:

> "In Hazelton v. The Bank, 183 U. S. 130, the action was against the national bank to recover, under section 5198 of the Revised Statutes for usurious interest alleged to have been charged. There was judgment in favor of the plaintiff in the action. It was reversed by the Supreme Court of the state on the ground that he had neither paid nor tendered the principal sum and the case was remanded for further proceedings. The case therefore was remanded for a new trial in its entirety. It was ruled that the face of the judgment is the test of its finality, and that this court cannot be called on to inquire whether when a case is sent back the defeated party might or might not make a better case."

There it was found that *the case was remanded for a new trial in its entirety.* That fact was ascertained only by looking into the opinion of the Supreme Court of the state, and after having ascertained that fact it was ruled that the face of the judgment is the test of its finality, but in that

case, as in the case at bar, the opinion of the lower court was a part of its judgment and was looked into to ascertain the finality of the judgment. On the same page in 233 U. S. the court says:

> "This rule (that the face of the judgment is the test of its finality) was again expressed in Schlosser v. Hemphill, 198 U. S. 173, in a case where the right to amend the pleadings existed and a new case could have been made."

Thus again showing that the rule that the face of the judgment is the test of its finality is only expressed when it is appropriate to the condition presented by the case. The judgment of the Supreme Court of Louisiana will be found in full, 129 Louisiana 322.

Winn v. Jackson, 12 Wheaton 135, throws no light on the question. The motion to dismiss was allowed without opinion. For aught that appears the court may have read the decision of the State Supreme Court to ascertain whether or not the judgment was final. Doubtless it did if there was one.

The action was in ejectment.

The remand was "for further proceedings not inconsistent with the decision".

In the case of Moore v. Robbins, 18 Wall. 588, cited by the appellees, the court said:

> "There the decree of the lower court was reversed and the case was 'remanded to the circuit court for such other and further proceedings as to law and justice shall appertain', *the*

ground of reversal does not appear in the record."

The mention by the Supreme Court of the fact that *"the ground of reversal does not appear in the record" shows that the ground of reversal would have been considered had it appeared in the record.* If the ground of reversal was not material, the court would not have mentioned it.

It is quite evident that the *opinion* of the Illinois Supreme Court did not appear in the record.

The action was to foreclose a mortgage, and decree in favor of complainant was reversed by the State Supreme Court. It is quite apparent from the very nature of the case that the litigation was not concluded by the judgment of reversal.

In District of Columbia v. McBlair, 124 U. S. 320, the question did not arise on motion to dismiss, or in any jurisdictional way, but rather by contention more in the nature of *res adjudicata,* the claim being that the matter involved had been previously adjudged against the District of Columbia by a decree of the general term, which was claimed to be final, against the District. The mandate of the general term remanding the cause was:

"To be *further proceeded with as the parties might be advised."*

How the parties might be advised is certainly an unknown quantity and such a judgment could not be final.

In the case of Smith v. Adams, 130 U. S. 167, cited, it is seen on page 171 that the lower court sustained a demurrer to the complaint and the plaintiff elected to stand upon his complaint without amendment and the same was dismissed. On appeal to the Supreme Court of the territory this judgment was reversed and the cause remanded to the district court for further proceedings according to law and the judgment of the appellate court. It is apparent in the condition of the case that under such an order of remand there was something to be done in the district court requiring judicial action on its part. The complaint having been held good on demurrer, it was incumbent upon the defendant to answer it and the cause would proceed to trial. It was under these circumstances that the judgment of the Supreme Court of the territory was held not final.

In Lodge v. Twell, 135 U. S. 232, the remarks of the United States Supreme Court were directed to the decree of the lower court, which, while it settled the equities of the bill, was clearly interlocutory, as, after the equities were settled, the property was to be sold by a receiver, accountings had and the amount ascertained that should go as a judgment against the defendants. And the court looked into the condition of the case to ascertain this.

Mr. Justice Fuller in his opinion says, p. 235:

> "The decree was interlocutory, not final, even though it settled the equities of the bill."

The following significant language is used in the opinion, p. 235:

> "What was left to be done was something more than the mere ministerial execution of the decree as rendered."

Hazelton v. Central Nat. Bank, 183 U. S. 130, is sufficiently commented upon in the opinion of Mr. Justice McKenna in Carondelet Co. v. Louisiana, *supra.*

> Louisiana Nav. Co. v. Commission, 226 U. S. 99-102;

We have already quoted the comment on this case embraced in the opinion of Mr. Justice McKenna in 233 U. S.

We invite the attention of this court to the fact that the opinion of Mr. Chief Justice White in the case conclusively shows *that the Supreme Court of the United States read the opinion* of the Supreme Court of the State of Louisiana *and considered it as part of the judgment,* and from it determined whether the judgment sought to be reviewed was final or not.

In the first paragraph of the opinion of Mr. Chief Justice White, portions of the opinion of the Supreme Court of Louisiana are epitomized. There it is said:

> "The court below elaborately reviewed the averments of the petition and expressed the opinion that in some respects a cause of action was stated."

Thus it is seen that the opinion is a part of the judgment, the face of which is to be scrutinized for the purpose of ascertaining whether or not the judgment expresses finality.

We have quoted from Mr. Justice McKenna, in 233 U. S., comment on Schlosser v. Hemphill, 198 U. S. 173-176, sufficient to show that the case was one where *the right to amend the pleadings* existed and a new case could have been made.

In all the cases cited it is apparent that it was possible to do something further. In the case at bar it is *not* possible to anything further.

THE "DECISION" (OPINION) IS A PART OF THE "DECREE". FOUND IN THE TRANSCRIPT (p. 453).

The trial judge must read the *decision* in order to ascertain what action is "compatible to the decision" just as much and as if the opinion were embodied in the decree.

Doubtless, the form adopted is in the interest of brevity. The form makes it unnecessary to repeat the language of the opinion, but makes the opinion part of the decree by reference.

Hurlbut Land Co. v. Truscott, 165 U. S. 719, and Oklahoma v. Neville, 181 U. S. 615—in neither case is there any opinion.

Estis v. Traube Davis Co., 128 U. S. 225-230, involved only the question whether the judgment

sought to be reviewed was a *joint* or *several* judgment, being held to be a joint judgment, it was determined that *one* judgment defendant could not sue out a writ of error without proper summons and severance in order to allow the prosecution of the writ by any less than the whole number of the defendants against whom the judgment is entered, and hence, *"for these reasons the writ of error is dismissed"*.

Memphis Keeley Inst. v. Keeley Co., 144 Fed. 628 (6th Circuit) is disposed of as authority by quoting the syllabus:

> "A decree dismissing a bill, in so far as relates to one branch only of the controversy between the parties, and that a subordinate one, leaving the principal issue in the case undetermined, is not a final decree, and it is not appealable."

Stillwagon v. B. & O. R. Co., 159 Fed. 97, may be disposed of by the following statements by Judge Cross who delivered the opinion:

> "* * * The writ of error in this case brings before this court for review the following order of the circuit court:
>
> 'And now, to wit * * * the plaintiff * * * having made a motion for leave to file an amended petition in the above case, leave to file the same is hereby refused.'"

Montana Ore Co. v. Butte etc. Min. Co., 126 Fed. 168 (9th Circuit), is likewise disposed of by the syllabus:

> "An order made by a court of equity pending a suit to enjoin trespassers on mining property,

> actual and threatened, for an inspection and survey of the *locus in quo,* is not a final judgment, order, or decree, and is not appealable."

Southern R. Co. v. Postal Cable Co., 93 Fed. 393 (4th Cir.). The syllabus is as follows:

> "An order in condemnation proceedings appointing commissioners to assess the damages is not a final order, to which a *writ* of error will lie."

Here are some of the tests of finality applied in cases cited:

> "The litigation of the parties as to the merits is terminated."

> "Nothing remains to be done but carry what has been decreed into execution."

> "Whether the decree disposes of the entire controversy between the parties."

> "Terminates the litigation on the merits of the case and settles the rights of all parties."

> "Has the court below judicial or merely ministerial functions to perform under the mandate."

The test whether the litigation is ended, by the judgment appealed from, if adopted in this case, can bring but one answer. It is not necessary to go to the *record* for the answer. The answer stands out in the opinion, which is a part of the decree.

No case has been cited and we have found none in which the appellate court has refused to read the

opinion of the lower court, to determine the question of the finality of a judgment announced in the opinion or to hold the judgment final, when the opinion showed it to be final.

An appellate court expresses its judgments in the form of written opinions. Is what is done, by such a court, to be ascertained from the opinion of the court or from what the clerk writes down, as his understanding of the opinion? If the opinion controls, then the whole opinion will be read (if necessary) to find out what the opinion means, decides, orders, adjudges; when that is done, in the case at bar, no uncertainty remains,—the opinion bristles with finality—the plaintiff's rights have been crucified and buried and only this court can roll the stone away.

In Hazelton v. Bank, cited, as construed by the United States Supreme Court in 233 U. S., the face of the record showed that "the case was remanded for a new trial in its entirety". But this fact was ascertained from the face of the judgment, including the opinion.

To the credit of our courts let it be said that there is no case cited in which, under analogous, much less parallel, circumstances, the judgment has been held not final.

Here are the circumstances which induced the decisions in the cases cited to support the motion.

Demurrer sustained without any judgment of dismissal. (Nearly all codes allow amendments as of right) Interurban Co. v. Olathe, *supra.*

Case remanded for a new trial in its entirety. Hazelton v. Bank, *supra.*

Case remanded for "such *other* and *further* proceedings as to law and justice shall appertain." Moore v. Robbins, *supra.*

Interlocutory decree for accounting, receiver, etc. Lodge v. Twell, *supra.*

One of several judgment defendants tries to review without summons and severance. Estis v. Trabue, *supra.*

Bill dismissed as to one part of controversy; other and more important parts retained. Memphis Keely Inst. v. Keely, *supra.*

Refusal of leave to file amended petition. Stillwagon v. B. & O. R. Co., *supra.*

Order for interlocutory injunction, etc. Mont. Company v. Butte Co., *supra.*

Messrs. Andrews & Pittman, the counsel who represented appellant in the Hawaiian courts, having been advised by cable of the pending motion, cabled back—

"Decision of Supreme Court dismissing petitioner's petition is final judication of all issues. Entry of judgment of dismissal in Circuit Court merely ministerial."

Citing 3 Corpus Juris, 458.

The effort of the legal profession is more and more directed, every year, toward eliminating from the administration of justice the things which have so gravely tended to create and foster distrust and

dissatisfaction with the results achieved in the administration of the law by the courts. Thousands of lawyers meet every year in bar associations and an examination of the reports of their proceedings will demonstrate that most of their time is spent in endeavoring to eradicate evils of practice just such as those of which the motion to dismiss, now before this court, is so good an example. The profession needs no higher tribute to its integrity of mind than the fact that it struggles, year in and year out, with unflagging zeal, and undiminished effort, to relieve the practice of the reproaches which judgments, such as that this court is now asked to pronounce, fasten upon the administration of the law. Time does not permit to notice any of these proceedings except those of the great nation-wide organization, the American Bar Association.

This association, after an effort lasting twelve years, had these words added to Section 269 of the Judicial Code, by an act approved Feb. 26, 1919:

> "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

See

American Bar Association report 1917, p. 334;

A. B. A. Journal, July, 1917, Vol. 3, p. 507;

Report A. B. A. 1918, p. 77;
Report A. B. A. 1919, p. 63.

No case will soon be presented to this court to which the principle of this legislation is more applicable, nor to which that principle may be applied with greater merit or justice, for here everything of substantial right is clearly with the appellant. The appellees support their motion only on ground of technical errors, defects and exceptions, so attenuated as to be incapable of visualization and so far fetched as to be fantastical.

It must be apparent to the court that to dismiss this appeal, under the circumstances presented by this record, is to deprive the appellant of a plain right; the judgment of this court on the case presented by the record has been sought under such circumstances, and the case itself is of such a nature, as to forbid that the court should refuse appellant the benefit of that judgment, *unless compelled to this refusal by positive and affirmative mandate of the law.*

If the accident which has happened be fatal to appellant's right to this review, *she* must bear it though she will never be able to *understand* it.

A conclusion by this court, that the motion to dismiss must be granted, will add one more case to the dwindling number which the members of the legal profession may understand but cannot defend and give occasion, and even add, incentive to the efforts of the bar to correct, by legislation, that

which it is the concensus of professional opinion constitutes a reflection upon our judicial system.

Laches.

APPELLANT WAS NOT GUILTY OF LACHES AND THE STATUTE OF LIMITATIONS IS NOT INVOLVED.

Counsel, apparently, have entirely misconceived the nature of this action. The statute of limitation is not involved. It is a suit in equity and not at law. We deem it unnecessary to burden the court by discussing the question of laches at length. Neither is it necessary to discuss the cases cited on this question.

Even if the statute of limitations were applicable six years had not elapsed between the bringing of this action and the death of Mr. Rumsey. Mrs. Rumsey brought suit against the Insurance Company in Denver, Colorado, immediately after the death of Mr. Rumsey and diligently prosecuted it. After it was dismissed by the Supreme Court of that state, she promptly brought the present action. Never for a moment did she sleep on her rights but always proceeded with the utmost diligence. Mr. Rumsey died in 1910. The case at bar was instituted in 1915. It certainly cannot be claimed that the statute ran against her before her husband's death. Her right did not accrue until after Rumsey's death as she had no vested right in the policy during his lifetime: the beneficiary could have been changed by him at any

time he desired. When he died, her right in the policy vested and this action was brought within the statutory period. Even if the statute of limitations were applicable, this court could not possibly be justified in adopting the rule, sometimes adopted by courts of equity, that equity follows the law. To do so would put a premium on fraud. This court will not permit the Drug Company to take advantage of its own fraud. The facts in this case are such that there is not the slightest reason for this court to even attempt to apply such rule: all the equities are with the appellant.

This question of laches was very strongly urged before the trial judge. He disposed of it in language which we ask leave to adopt as part of our argument:

> "Laches on the part of the plaintiff is also alleged by counsel for the Drug Company as a reason why she should not prevail here, it being claimed that she allowed more than six years to elapse between the date (August 30, 1907) when her husband demanded delivery of the policy by the Drug Company, and the bringing of the present suit. I find no merit in this contention. Her claim does not rest upon the question of the physical whereabouts of the piece of paper whereon the policy of insurance is printed or written. I have held, as above, that the action of Rumsey, as herein described, in his efforts to obtain a substitution of beneficiary under the policy, constituted, became and was, and thereafter continued an equitable substitution, as effective in all respects for the purpose of the present suit, as though the policy had been forwarded to the home office in

> New York, and the substitution physically endorsed thereon. There is no question of replevin, or the right to replevy, involved in this case. The fact that the particular piece of paper involved reposed in the safe of the Drug Company instead of having been delivered to Rumsey, or to his wife, does not affect in the slightest degree her right of recovery herein. The Statute of Limitations is not involved."

With due respect to learned counsel, it strikes us as a curious and roundabout route by which they arrive at the conclusion that either the statute of limitations or laches ran against this plaintiff because Mr. Rumsey did not sue the Drug Company for the policy when the Drug Company declined to turn it over to him. Laches is never imputed, except in cases where through the neglect, delay or failure of the party against whom the laches is asserted, the party claiming the benefit of the doctrine has changed his position, to his disadvantage.

If the Rumseys had remained silent, asserted no claim to the policy, made no attempt to change the beneficiary and allowed the Drug Company to pay the premiums without notice of any kind it might well be argued that the Drug Company was entitled to invoke the doctrine of laches against plaintiff.

This is not the state of the record.

On the contrary, everything was done that could have been done and whatever the Drug Company did, toward paying premiums, from very shortly after the marriage of the plaintiff and the insured,

it did with notice that its claim now made, would be contested and it paid the later premiums which it did pay in defiance of the direction and request of the plaintiff and her husband, that it should not pay them, and with notice that the plaintiff and her husband desired to pay these premiums. The defendant *raced,* as it were, with the insured and his wife, to get ahead of them in the payment of the premium due June 11, 1910, and actually paid the premium two days before it was due (see letter of July 5, 1910, from Gordon, manager, to Jackson, comptroller, Tr. p. 282).

THE DEFENDANTS DO NOT COME WITH CLEAN HANDS.

A court of equity will not impute laches, neither will it follow the analogy of the statute of limitations, when the delay invoked as a defense is brought about or contributed to by the parties seeking the benefit of these equitable doctrines.

He, who would invoke the doctrines of equity, whether as a sword or as a shield, must present himself to the court with blade bright and shield shining and spotless. The collusive suit instituted by the Drug Company against the Insurance Company, all knowledge of which was kept from appellant, is forever an answer to the claims now put forward by the appellees.

The Drug Company had its opportunity to litigate its rights in the courts of Colorado and if the

Insurance Company or the Drug Company had made the effort to get the appellee into the courts of Hawaii which were made to get the Drug Company into the courts of Colorado, the record does not disclose any fact upon which to hinge a doubt that the effort would have been successful.

The complaint (Pars. XXIV and XXV,Tr. pp. 18-19) sets up the collusive suit between the Drug Company and the Insurance Company. This collusive judgment was satisfied February 28, 1913 (Tr. p. 384) and this cause of action then accrued to appellant.

The appellees invoke the doctrine of laches against appellant. They say that laches is to be imputed to her through her husband, because he did not commence litigation in his lifetime—that her legal rights were lost by his delay.

At the eleventh hour they have moved to dismiss this appeal.

The motion to dismiss was reserved until the eve of the hearing. It was served on attorneys for the appellant May 7, 1920, at Denver.

In the meantime appellant had paid over $700.00 court costs and costs of printing the record, and several hundred dollars more in the way of expenses necessary to present her case to this court.

This is the only laches in the case.

There is a circumstance of this case to which attention has been called briefly, which is worthy of further notice. This is the fact that the appellant furnished the only proof ever furnished of the death of her husband. We call attention, in the appellant's first brief, to the pleading in the "suit" of the Drug Company against the Insurance Company, to the *sneaky* nature of the allegations of the complaint, and the admission of the answer therein, on that subject and to the palpable falsehood contained in the answer of the Drug Company, in this case, respecting that matter. The conduct disclosed is not only inequitable; it is contemptible. No court of equity will strain its conscience to afford relief to the parties guilty of this conduct.

As we understand it, counsel who appear in this court for the Insurance Company are not the counsel who participated in the collusive suit in Honolulu. It must be assumed that they are under a misapprehension as to the facts with respect to that suit, otherwise they would not write these sentences found on page 59 of their brief:

> "Under the compulsion of that judgment, and not as a voluntary act, this appellee was compelled to pay Benson, Smith & Co., Ltd., the proceeds of the policy.
>
> This change in position was brought about solely by appellant's failure to bring a timely proceeding in the courts of Hawaii. By her failure to do so, which has resulted in the prejudice to the Insurance Company, appellant

has lost her right, if any such ever existed, to have the policy reformed."

The Insurance Company purposely kept the fact of the institution of this suit a secret from appellant. It let its co-defendant now, and co-conspirator then, have all the benefit and advantage of what the appellant had done to assert her rights to the proceeds of this insurance policy; it let the Drug Company have this benefit without her knowledge; it joins the Drug Company now in denouncing a failure of the appellant, to do that which they conspired to prevent her from doing, as fatal to her claim.

THE DRUG COMPANY IS WITHOUT ANY RIGHT ON THE THEORY OF THE CASE ADOPTED BY ITS COUNSEL.

Counsel for the Drug Company present "three possible theories of the transaction which resulted in the issuance of the policy and adopt as their own, the *third,* to wit:

> "The transaction was a mutual tri-party agreement * * * supported by a valid consideration moving between each one and the others of the three parties to the agreement." Brief Drug Co., p. 10.

This theory, of the first basic fact, differs from ours only in that it assumes Rumsey to have been a free agent when the transaction was had and that he entered into it of his own free will and accord. We pointed out in our main brief the

facts which show that *Rumsey had no say and exercised no will in the transaction.* We also discussed there the "alternative" adopted by counsel for the Drug Company as "the correct one" (Appellee's Brief, pp. 12 to 16). The brief of the Drug Company fails utterly to meet the proposition of law that *the language of the policy is part of the contract,* if the transaction was, as counsel now say, the result of a contract freely entered into by Smith Rumsey, Gignoux, the Drug Company and the Insurance Company. Counsel are, of course, compelled to rely on *contract* or on *coercion:* to claim (1) that Rumsey agreed that his life might be insured *by the Drug Company* for the Drug Company or (2) to *admit* that the Drug Company insured his life for its benefit, without regard to Rumsey's wishes or consent.

They choose the first alternative and, in so choosing, cast themselves into a pit almost as deep as that from which they would thereby escape.

Counsel nowhere question the fact that the terms of the policy entered into, and became part of, the contract under which, as they contend, the policy was taken out. This proposition rests on such universally accepted and sound legal principles that it cannot be questioned.

Counsel refer to the "transaction" under which the policy was applied for and issued as a "mutual tri-party agreement". This, of course, is mere inadvertence, if, as seems to be intended, Smith, Rum-

sey and Gignoux are referred to. The Drug Company and the Insurance Company were certainly parties to the "transaction", whatever its nature.

On page 14 counsel refer to the transaction in these words:

> "If, as we contend the fact here was, the policy was *part of a mutual agreement* between these men which rested on a valuable consideration moving between them."

We agree with counsel that "the policy *was part of a mutual* agreement", if there was such an agreement, and a most important part too. There is not a word in the record to indicate that the parties ever contemplated anything with respect to the terms of the policy which is not written into the policy. Suppose it were claimed here that Smith, Rumsey and Gignoux had agreed on some other disposition of the proceeds of the policy, than that written into the policy, such claim would stand on no different footing than the claim now made that the recital:

> "The insured, *having reserved the right,* may change the beneficiary * * * *at any time",*

is not a part of the policy.

The court cannot take this life insurance away from Rumsey's widow unless it can say that *these words of the policy mean nothing,* that they never meant anything, that they were eliminated from the policy by some magic not disclosed by the record. Counsel are too prudent to claim, in so many words,

the things which inevitably follow if their claim made be allowed. Some of these are:

The provisions respecting a change of beneficiary are nugatory.

The policy says the insured reserved the right to change the beneficiary. *The statement is false.* The policy says the insured may change the beneficiary at any time. *The statement is false.*

The policy provides for two classes of beneficiary:

(a) Named beneficiary

(b) Absolute beneficiary.

Benson Smith & Co. was *the named beneficiary,* as the policy was written but this is all wrong, false, a mistake. Benson Smith & Co. was the *absolute beneficiary* and these words of the policy apply to them, although the policy is not so written; "During the lifetime of an Absolute Beneficiary the right to revoke or change the interest of that beneficiary will not exist". True none of the *five* parties to the transaction (adopting the Drug Company's theory), the three individuals more or less concerned, nor the two corporations, ever so claimed before, but this court is asked to give this construction to enable the Drug Company and the Insurance Company to maintain the clandestine scheme under which the Drug Company sued and obtained judgment against the Insurance Company.

After having said that "The policy in question (which, of course, includes the provision for a

change of beneficiary) was part of a mutual agreement between three men, learned counsel for the Drug Company proceed naively to argue, that because one of the parties to the agreement was, thereby, clothed with dominion over the subject matter of the agreement, which dominion enabled this party to prevent another party to the agreement from exercising his rights thereunder, the courts can give the injured party no relief; such fact emasculates the agreement of its only potention benefit to one of the parties to the agreement, "cuts the heart out of the covenant", as it were.

If the recital of the policy that Rumsey had reserved the right to change the policy, at any time, be true, then this right was part of "the mutual agreement" and that which the policy required any other party to the agreement to do, in order that this reserved right might be exercised, such other party was required to do, on such terms as law and equity imported into the contract, *i. e.* refund of the premiums and interest. Failure to do what was so required was a wrong against the party in whose favor the right was reserved. And the wrongdoer now seeks to benefit by its own wrong.

Continuing the process of reasoning, to which the exigencies of the case drive them, counsel say:

> "Where a policy has been assigned, pledged or otherwise placed in the possession of one pursuant to some contract, the possession is an effectual pledge or guarantee that no change of beneficiary will be made. So long as the

> beneficiary holds the policy under such agreement, no change can be made."

And again, page 17:

> "If the policy in question is to be regarded as Rumsey's, then the uncontradicted facts show that he assigned or pledged it to Benson, Smith & Co., for a valuable consideration, namely, the payment of the premiums and the interest which Rumsey was given, through the company, in the policies on the lives of Smith and Gignoux."

One might as well argue that delivery of a pledged article to a pledgee is an effectual pledge or guaranty that the pledge will never be redeemed and that the refusal to deliver the pawn clothes the pledgee with all the rights of ownership.

"So long as the beneficiary holds the policy under such an agreement, no change can be made", continues the argument with an ingenuousness that is refreshing. So long as the pawnbroker refuses to let me redeem my overcoat, I must suffer the cold winds, like poor King Lear!

We do not gather from the correspondence between Smith and Rumsey, referred to on page 16 of the Drug Company's brief, the same meaning as that imputed by learned counsel. The significance of Smith's letter of January 22, 1907, is that he there recognized the right of Rumsey to change the beneficiary and the justice of the proposed change from the Drug Company to Rumsey's wife. Cupidity had not yet engaged in a contest with conscience

—and won. So the letter has all the advantages of contemporaneous construction. Of statements against interest, made *ante litem motem* and of interpretation by conduct inconsistent with the position now taken. We have elsewhere herein pointed to conduct of the Insurance Company showing a like construction on its part. Rumsey's correspondence with Smith shows that Rumsey always took the position that he had the right, which the policy says he had *"reserved"*. The correspondence was in no sense one relating to compromise, nor is it to be cast aside as a non-accepted offer, *it is an acknowledgment of a right.*

NO VESTED INTEREST IN THE DRUG COMPANY.

A consideration of the terms of the policy will show that it does not require any distortion of its provisions to sustain the claim of the appellant.

The contract with the insured is set forth in the policy itself.

Nothing has been adduced to vary this contract.

By the contract the insurer was to pay, on the death of the insured, to the beneficiary therein named, *or to such beneficiary as may have been duly designated.* There is no distinction, superiority or preference in rank.

By the terms of the contract, the insured *"reserved the right"* to *name who should take the proceeds* of the policy upon his death, just as

fully, and completely, and absolutely, as if no beneficiary had been originally named.

The following provision of the change of beneficiary clause, "The insured, having reserved the right, may change the beneficiary or beneficiaries at any time", is complete, when the things which the insured was, by the terms of the policy required to do, have been done.

There is contained in the policy only one reservation against the exercise of this power, and that is, at the time of exercise of the power, the policy must not *be assigned.*

When the change *takes effect* is a different question.

There does not seem to be room for doubt but that, under the terms of the policy, the insured had a right to *revoke the designation* of the beneficiary named in the policy *without appointing another.* If there could be any doubt about this the use of the word "revoke" in that portion of the change of beneficiary clause last above quoted clearly implies this right.

This being true, an *attempt* to designate another as beneficiary although the *attempt* might, for some technical reason, be *ineffective,* as a designation of a new beneficiary would amount to a *revocation* of the named beneficiary.

That what the insured did *amounted to a revocation* of the named beneficiary, cannot admit of dispute.

The *named* beneficiary took the policy *subject* to the right to *change* the beneficiary; *otherwise the terms of the contract must be altered and rewritten by the court.*

Aside from the first two paragraphs of the policy there is, running all through the policy, the idea that it, the insured, retains the right to assume and exercise *control* of the policy and its *proceeds.*

Thus, Tr. p. 28,

> "The policy participates in the profits of the company as herein provided."

The next paragraph states that if the insured is living on a day named,

> "The company will then apportion to this policy its share of the accumulated profits, and the insured shall then have the option of one of the following:
>
> "Six Accumulation Benefits.
>
> "(1) Receive the profits, *in cash* and continue this policy by payment of the same premium as previously; or
>
> "(2) Receive *the profits,* converted into an *annual income for life,* and continue this policy by payment of the same premium as previously; or
>
> "(3) *Receive the profits,* converted into additional paid-up insurance, subject to evidence of insurability satisfactory to the company, and continue this policy by payment of the same premium as previously; or
>
> "(4) *Receive the entire cash value* as stated below, *converted into an annual income for life, and discontinue this policy;* or
>
> "(5) *Receive the entire cash value,* as stated below, *in cash, and discontinue this policy;* or

"(6) *Receive the entire cash value,* as stated below, converted into paid-up insurance payable at death, and discontinue this policy."

A consideration of these and other clauses shows that in case of the continuation of the life of the insured, for the period mentioned, the *named beneficiary could receive no benefit from the policy without further action on the part of the insured,* and that, as these things go, *the insured,* and not the *beneficiary,* would reap the benefit.

In the clause of the policy commencing at page 28, it is provided that the company must send to the *insured* a statement of the results of the six accumulation benefits, and if the *insured* does not make selection, the policy "shall be converted into an annual income for life".

In such annual income for life, the *beneficiary could have no interest.*

The clause of the policy found on pages 29-30 provides for *loan values,* all for the benefit of the *insured,* and nothing for the benefit of the *beneficiary.*

In the second paragraph of the clause commencing on page 31, the *insured's* written request is to govern rights under the policy in case of failure to pay premiums, and in the next clause the provision for the payment of a premium in default is based on a request of the *insured.*

It will further appear that the *insured* had the policy at all times *absolutely within his power,* not

only by the right to change the beneficiary, to revoke the named beneficiary, to designate an absolute beneficiary, as it is called, but, by his choice of the six accumulation benefits, to *destroy any interest of the named beneficiary.*

The same thing might have been done by procuring a *loan* or by changing the mode of payment of the proceeds of the policy to installments, as provided in the policy.

And so, *in many other ways,* to which we do not deem it necessary to call attention, *all interest in or benefit* from the policy might have been taken away from the *named beneficiary.*

This being true, there never was any *vested right* in the named beneficiary.

The correspondence with the Insurance Company, relating to the change of beneficiary, begins with a letter from Mr. O'Donnell, attorney for the insured, dated June 8, 1907 (Tr. p. 257) requesting a copy of the policy. The reply of the Insurance Company, dated June 14, 1907 (Tr. p. 258) states: "Upon written notice from the INSURED * * * information * * * in regard to the policy" will be furnished.

Mr. Rumsey made a written request and the company complied with the request.

"The *insured*" was thus recognized as the person having the right *to control the acts of defendant with relation to the policy.*

A letter from the company dated June 27, 1907 (Tr. pp. 259-260) refers to the policy by number and name. It states the date, the amount, character of the policy, the age of the insured when written, the amount of the annual premium, and the time to which the premium had then been paid, and then follows this significant statement:

> "The policy is *written* in favor of Benson, Smith & Co. Ltd. or its legal representatives, *or to such other beneficiary as may be designated by the insured in accordance with the terms of the change of beneficiary clause in the policy, which reads as follows:*"

The change of beneficiary clause is then set out.

Note the language above quoted from this letter. *This is the construction placed upon the policy by the company.* We quote again:

> "The policy is written in favor of Benson, Smith & Co. Ltd. or its legal representatives, *or to such other beneficiary as may be designated by the insured.*"

It stands out clear, from the foregoing, that if the Drug Company had a vested interest in the policy by reason of the transaction under which the policy was issued or by reason of being the named beneficiary therein or by reason of any or all the facts now before this court, the company which issued the policy did not suspect it.

The fact that the insured was later furnished by the Insurance Company with a form for change of beneficiary and the language of that form preclude

the idea that the Insurance Company considered, at the time it furnished this form, that the Drug Company had a vested right.

The form recites that the change is made "in accordance with the change of beneficiary clause" (Tr. p. 261).

The brief filed by the Insurance Company, May 11, came to our attention late on May 12th.

Part V of this brief is devoted to the subject we are now discussing.

We think a fair reading of the brief discloses that counsel responsible for it have very little, if any, confidence in the theory of "vested rights" outlined in the Drug Company's brief and stated more at length in the Insurance Company's brief.

They, practically, defend against appellant's claim on the ground that the delivery of the policy to the Drug Company amounted to an assignment of the policy, by Rumsey.

Such an agreement must result from operation of law alone, for there is not a word in the record to support the idea that the parties ever had any thought of entering into such an agreement.

If there was an agreement between Smith, Rumsey and Gignoux which prevented any one of them from withdrawing his policy from the Drug Company without the consent of the other two, it was incumbent on the Drug Company to establish the

agreement. This it has not attempted to do. There is no suggestion of any such agreement in the correspondence between Smith and Rumsey, either in that which preceded or that which followed the rupture of their friendly relations. In our first brief we called attention to the fact that if there had been such an agreement the policy which it is now admitted was "part of the mutual agreement" would not have contained a provision that the insured "having reserved the right, may change the beneficiary * * * at any time".

In Grimbley Harrold, 125 Cal. 24, cited, the insured agreed not to change the beneficiary, whereas, in the case at bar, Rumsey not only did not agree that the beneficiary could not be changed but expressly *reserved* the right to make the change.

There is absolutely nothing by way of agreement, suggested by the record, which prevented Rumsey from changing the beneficiary just as the policy provides. Rumsey received no consideration, from the Drug Company, for permitting it to insure his life in its favor, hence the claim to the policy and its proceeds, under the theory of assignment by Rumsey to the Drug Company, is a later day thought, the result of conviction that something must be interpolated into the case, which is not in the record, to justify the affirmance of the judgment.

The object of life insurance is to provide a fund for those dependent upon the insured (Mutual Life Ins. Co. v. Lowther, 22 Colo. App. 623). Ordin-

arily the beneficiary of a life insurance policy is such a dependent. When one having some natural expectancy of benefit from the continuation of the life of the insured is named as beneficiary, different rules apply than those applied in cases where the beneficiary occupies a relation such as in the case at bar.

A policy of insurance does not create a vested interest in the beneficiary during the life time of the insured, when, by the terms, the insured reserves the right to change the beneficiary. Under such a provision the right of the beneficiary vests conditionally, not absolutely, and the insured, without the knowledge or consent of the beneficiary, may designate another, for the reason that the rights of the person named in the policy as beneficiary are subject to be defeated by the terms of the contract naming him as such. In other words, this is a condition of the contract, and his right is therefore subject to it.

Hopkins v. N. W. Ins. Co., 99 Fed. 199;
Mutual Life Ins. Co. v. Twyman, 92 S. W. (Ky.) 335;
Hopkins v. Hopkins, 17 S. W. (Ky.) 864;
Atlantic M. L. I. Co. v. Gannon, 60 N. E. (Mass.) 933;
Martin v. Stubbings, 18 N. E. (Ill.) 657;
Delaney v. Delaney, 51 N. E. (Ill.) 961;
Splawn v. Chew, 60 Tex. 532.

Hopkins v. Insurance Company, *supra,* is a very strong case in favor of appellant's contention and

we ask the court to read it carefully. The rights of the parties are settled by reference to the language of the policy. It is, in effect, held that there can be no such thing as a permanent or vested interest in a beneficiary named in a policy which contains provision giving the insured the right to change the beneficiary. Under such circumstances it is declared:

> "The right of the beneficiary is inchoate and a mere expectancy during such lifetime, and does not become vested until the death of the insured happens with the policy unchanged",

and Mr. Justice Gray asks this question, very pertinent, in the case at bar.

> "Has a beneficiary a 'vested interest' when the certificate or policy itself, the association's by-laws, and the statute under which it was incorporated all provide that the payee or beneficiary may be changed *at any time* without requiring the consent of such payee or beneficiary" (99 Fed., p. 201).

Cooley's Briefs on Insurance lays down the rule, without question or doubt, that in a policy of the kind here being considered, the beneficiary has no vested right, but merely an expectancy, while the insured lives. In Vol. 4, at page 3770, it is said:

> "The original beneficiary in whose possession the policy is cannot, however, defeat the change by refusing to surrender the certificate."

On page 3772 the author states in BOLD FACED type the above principle for which we contend, and supports it by innumerable authorities.

The rules of procedure in effecting a change of beneficiary are intended only for the protection of the insurer, and therefore may be waived by it.

Adams v. Grand Lodge, 105 Cal. 321-326; 45 Am. St. Rep. 45;

Simcoke v. Grand Lodge, 84 Ia. 383, 386, 387, 388; 15 L. R. 114;

Manning v. Ancient Order of Workmen, 86 Ky. 136, 140, 141; 9 Am. St. Rep. 279;

Grand Lodge v. Reneau, 75 Mo. App. 402, 409, 412;

Fanning v. Supreme Council, 82 N. Y. S. 733, 735, 736 (approved 178 N. Y. 629);

John Hancock Ins. Co. v. White, 20 R. I. 457, 459; 40 Atl. 5;

Supreme Conclave, Royal Adelphia v. Capella, 41 Fed. 1, 4-8;

Order of Patricians v. Davis, 129 Mich. 318, 319, 320;

Pacific Mut. Life Ins. Co. v. Carter, 92 Ark. 378, 387, 388; 123 S. W. 384.

If the Insurance Company has waived a strict compliance with its rules in regard to a change of beneficiary, *"or if it was beyond the power of the insured to comply literally with these regulations, or if the insured did all in his power to comply with them, then the original beneficiary cannot be heard to complain that the course indicated by the regulations of the defendant was not pursued".*

Lahey v. Lahey, 174 N. Y. 146, 154-158; 95 Am. St. Rep. 554;

Nally v. Nally, 74 Ga. 669, 675, 676;
Supreme Conclave, Royal Adelphia v. Capella, *supra;*
Jory v. Supreme Council, 105 Cal. 20, 27, 31;
Isgrigg, Executor v. Schooley, 125 Ind. 94, 99, 101;
Grand Lodge v. Child, 70 Mich, 163, 170-173;
Joyce on Ins. (2) Sec. 751;
Niblack on Ins. (2nd Ed.), Sec. 223.

In the Insurance Company's brief it is said (p. 45):

> "Appellant's whole claim is based upon the technicalities concerning the wording of the policy."

If to claim the benefit of the plain wording of a written instrument, of language incapable of construction, of an instrument which must have part of its terms torn from it before it can be given the meaning which appellees would put upon it, be technical, then appellant's claim is based upon technicalities.

It is to be noticed that the brief of the Insurance Company does not, any more than the brief of the Drug Company, take up the challenge in appellant's brief to answer why, if the parties intended what appellees now claim was intended, the Drug Company was not made absolute beneficiary. Why was the policy written, as we have it in the record, if

its provisions were mere sound and fury signifying nothing.

Under their heading "Errors Relied upon by Appellant" counsel use this language in stating their interpretation of one of our contentions (Insurance Co's. brief, p. 7):

> "(2) The Supreme Court of Hawaii erred in holding that the Drug Company was the absolute beneficiary under the policy."
>
> *"Absolute Beneficiary."*

The parties did not so name the Drug Company but the Insurance Company now asks the court to hold that company to be Absolute Beneficiary.

If the parties had been of the mind then, that the Insurance Company's counsel is of now, the term *"absolute beneficiary"* would have been used in the policy, in the same sense in which it is now used in the brief.

The term is in the policy but it is not hitched up as counsel would have this court hitch it.

We cannot concede the conclusion to which the authors of the Insurance Company's brief arrive under the heading commencing page 46 "The new offer—Its non-acceptance".

If what occurred betwen Rumsey and Smith, part of which is stated under this heading, but the whole of which we ask the court to read, were merely

a voluntary offer, based on no obligation, there might be some plausibility in the contention put forward.

It was not an offer as much as it was an acknowledgment, and the difference between Smith and Rumsey as to *the terms upon which Rumsey might exercise this acknowledged right did not detract from the force of the acknowledgment of the right.*

The words in Rumsey's letter "in taking over the policy I should prefer to do so at the June payment" simply relates to the time when the premiums should be refunded. Rumsey wanted the refund taken out of the payment which Smith was to make to Rumsey, for Rumsey's stock, in June following.

Nor is the language of Smith in his letter of April 11, 1907, correctly interpreted in the brief. The words,

> "We will therefore consider this matter as closed",

do not mean that the transaction is to be abandoned. What it means is that the transaction is concluded, and is to be finally settled on the terms contained in Smith's letter of January 22, 1907 (Tr. p. 140). Smith ended the argument. This is shown by his letter of September 25, 1907.

Counsel apparently admit the proposition that the Insurance Company might waive the provision

for endorsement of the change of beneficiary on the policy. In discussing the facts on which the claim of waiver is predicated however they endeavor to perpetuate the mistake of the Territorial Supreme Court, so clearly exposed in appellant's first brief, pp. 28-31. They continue to ignore the fact that this premium was accepted from the Rumseys at and by the Home Office in June 1910.

OTHER MEMORANDA AS TO THE INSURANCE COMPANY'S BRIEF.

Time prevents any extended consideration or discussion of this brief. We may only notice some of its more palpable lapses.

Thus on page 11, speaking of the circumstances under which the insurance policies were taken out, it is said:

> "While the record shows (Rec., p. 159) that Mr. Smith suggested that each of the principal stockholders should insure his life for the benefit of the corporation, there is no element of threat or of a refusal to comply with the suggestion in the entire transaction. On the contrary, the depositions which form part of the agreed statement of facts, and *which are the only evidence on that point,* unanimously support the contention that there was a voluntary agreement between the three principal stockholders." (Italics ours.)

Counsel have failed to read the letter of Smith to Rumsey dated December 25, 1907 (Tr. 159), printed on page 19 of our first brief.

On page 25 of the Insurance Company's brief after claiming that the Drug Company had a contractual interest in the policy and therefore its act in withholding the policy was not wrongful, it is said:

> "A court of equity must look thru the contract to ascertain the real intention of the parties."

So it should, but in the case at bar the court must look *beyond* the contract and have visions in order to hold that the real intention of the parties was expressed neither in the written contract nor in anything that was ever said between them nor in any single scrap of paper, which ever passed between them.

Both appellees claim that the Insurance Company has paid the Drug Company. We assume this to be the case. Trial judge found and the record conclusively shows that the two appellees dealt with each other covinously, to defraud appellant. That the combination formed, whatever may be its details, persists, is shown by the fact that the Insurance Company raises the question that if appellant's contention, as to the facts surrounding the taking out of the policy, be sustained, then there never was any liability on the policy. We think the Insurance Company is estopped, certainly the Drug Company is estopped, from making such a claim. The raising of the question is cumulative evidence of the fact that the combination against appellant continues.

Cammack v. Lewis, cited in the Insurance Company's brief is strangely like the transaction shown in the record when we compare Smith's holdings in the Drug Company with those of Gignoux, to say nothing of the discrepancy between the holdings of Smith and those of Rumsey. We are indebted for the citation of

Finnie v. Walker, 257 Fed. 698,

on page 41 of the Insurance Company's brief. It conclusively appears that Rumsey either "was a very sick man" at the time that the policy was taken out or that he became "a very sick man" shortly thereafter and "that the amount of the contract compared with what was paid, permitted playing for a large stake".

We cannot allow counsel to select our ground for us.

We expressly stated in our opening brief that we did not intend by the order in which we stated our contentions to indicate that we regarded any one of them as more persuasive, important or more conclusive than the other (p. 11). In that brief we showed conclusively, as we think, that Rumsey had a right, by contract with the Drug Company, to change the beneficiary.

We undertook to show the elements that entered into the contract, under which the policy was taken out, assuming it to be true, as contended by

appellees, that the policy was taken out as the result of a contract to which Rumsey was a party.

The Drug Company, in its brief, confesses our contention that the policy must be taken to be an integral part of such a contract.

The Insurance Company does not deny this contention. Both claim that, somehow, somewhere, by some chemic undisclosed or by some occult force undiscovered, the plain provisions of the policy, respecting change of beneficiary, were erased, obliterated and cut out of the contract. We say that the court will find these provisions just where they were put, at the time the policy was issued. They were not written in invisible ink. Everybody connected with the transaction knew all about them all the time and every act of everybody connected with the transaction is consistent with the idea that everybody understood everybody else's rights in just the sense the substituted beneficiary, wife and widow, now contends them to have been, until Smith and Rumsey disagreed or Rumsey's rapidly failing health aroused Smith's greed. And so we say, as we said in our original brief, that the question of insurable interests, either at the date of the policy or afterwards, the question whether the cessation of insurable interests changed the rights of the parties, the question of gambling contract, wagering on life and the like, the question of whether the Drug Company, thru Smith, agreed that the wife might be substituted as beneficiary, the

question of whether the Insurance Company waived the requirement that the change of beneficiary should be endorsed on the policy and even the tergiversations of the two corporations which combined to resist appellant's claim, may be left undecided because there is no difficulty, either in law or in fact, in the way of holding the appellant entitled to recover under the contract which, as appellees contend, originated whatever rights any party to the litigation ever had as well as the obligation of the Insurance Company.

We do not, however, waive any right of appellant and we have mentioned the time when we received the Insurance Company's brief in order that the court may understand that failure to reply the various phases thereof is caused by lack of time and not by acquescience of its contentions.

Respectfully submitted,

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